STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

KENNETH J. SPEICHER, an Individual

Plaintiff-Appellee,

V

COLUMBIA TOWNSHIP BOARD OF TRUSTEES and COLUMBIA TOWNSHIP PLANNING COMMISSION,

Defendants-Appellants. /

Supreme Court No. 148617

Court of Appeals No. 306684

Lower Court No. 11-600857-CZ

148617
MSA

REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT I

Review Is Required Because Speicher's Effort To Downplay The Significance Of The Issue Presented Is Unpersuasive.

Mr. Speicher argues that the Open Meetings Act is a "little used statute yielding only 27 reported decisions since its enactment in 1976." (Speicher's Brief in Opposition to Defendant/Appellants Application for Leave to Appeal, p 1). Contrary to Speicher's suggestion that only a few cases have been decided under the statute, a Westlaw search reveals that 263 cases have been decided since the Open Meetings Act was enacted into law. And the search reveals 133 reported cases, a very high number. (Exhibit A, Westlaw search results). More importantly, the Open Meetings Act is a matter of public significance because it governs how the state and local governments must operate their meetings, and provides the relief available if they violate the Act. Thus, the issue is critical since governmental bodies covered by the Act hold meetings throughout Michigan each and every day. In order to conform their conduct to the Act's provisions, and predict the consequences when they fail to do so, they deserve clear and consistent judicial decisions interpreting the Act.

ARGUMENT II

Review Is Required Because The Court Of Appeals Decisions Regarding Actual Costs And Attorney Fees Under The Open Meetings Act Are Hopelessly Muddled.

The law is currently muddled with one line of decisions, listed in the Court of Appeals order vacating its decision in this case insofar as it pertained to attorney fees, holding that attorney fees and court costs must be awarded any time regardless of whether the plaintiff succeeded in obtaining an injunction. *Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003); *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Manning v East Tawas*, 234 Mich App 244; 609 NW2d 574 (2000); and *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998). At the same time, other published opinions offer conflicting analysis and outcomes that are inconsistent with the prior decisions. See *Leemreis v Sherman Twp*, 273 Mich App 691, 707-709; 731 NW2d 787, 795-797 (2007); *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981); *Felice v Cheboygan County Zoning Commission*, 103 Mich App 742; 304 NW2d 1 (1981); *Saline Area Schools v Mullins*, 2007 WL 1263974 (No 272558, Mich Ct App May 1, 2007) (unpublished)(attached hereto as Exhibit B).

In *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981) a panel of the Court of Appeals decided a case on the basis of a judicial gloss that altered the

statutory relief. There, the court held that attorney fees were warranted only because plaintiff received the equivalent of an injunction (and where the trial court stated it *would* have issued an injunction but for the promise of defendant to comply in the future). *Ridenour* took liberties with the plain language of the Open Meetings Act, which provides for an award of attorney fees and court costs upon the "obtaining relief" in a "civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act". MCL 15.271(4). *Ridenour* read this language to allow recovery despite the determination that injunctive relief was not warranted because there was no threat of future noncompliance.

Later courts have articulated the rule as "the imposition of attorney fees is mandatory upon the finding of a violation of law...." without any discussion of the kind of relief or the language in the statute. See e.g., *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 91; 669 NW2d 862, 870 (2003). This articulation has lost its connection to the precise statutory language governing relief in a civil action for injunctive relief. Once decisions interpreting and applying a statute come unmoored from the language, they can drift farther and farther away from those moorings. Panels of the Court of Appeals today apply a rule that "the imposition of attorney fees is mandatory upon a finding of a violation of the OMA." (*Speicher* slip op, p 3, December 19, 2013 citing *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005).

In *Nicholas v Meridian Charter Twp Board*, 239 Mich App 525, 535; 609 NW2d 574, 580 (2000), for example, the Court of Appeals announced that because the trial court declared that the defendants had violated the Open Meetings Act, they were the plaintiffs were entitled "to actual attorney fees and costs despite the fact that the trial court found it unnecessary to grant an injunction given defendants' decision to amend the notice provision after plaintiffs filed the present suit." (*Id.* at 535). The *Nicholas* court cited *Ridenour, Schmiedicke,* and *Menominee Co Taxpayers Alliance, Inc v Menominee County Clerk*, 139 Mich App 814; 362 NW2d 871 (1984) for that proposition. It discussed *Manning v East Tawas* which awarded attorney fees for a mere finding of a violation of the Open Meetings Act, despite the absence of an award of injunctive relief. 239 Mich App at 537. ("*Manning* is in harmony with the cases cited above that hold that a trial court's finding that a violation of the OMA has occurred constitutes declaratory relief that is adequate to justify an award of attorney fees and costs.")

This Court has repeatedly taught that if the Legislature has clearly expressed its intent in the language of a statute, the statute must be enforced as written free of any contrary judicial gloss. *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 758; 641 NW2d 567 (2002); *Nawrocki v Macomb County Road Commissioners*, 463 Mich 143, 150-51; 615 NW2d 702 (2000); *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010); *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). The judicial gloss created in *Ridenour v Bd of Education of the City of Dearborn*

School District, 111 Mich App 798; 314 NW2d 760 (1982) has since morphed into an absolute rule requiring costs and attorney fees for any violation even if no injunctive relief is awarded and even if no suit for injunctive relief was ever brought.

This Court has not spoken about the issue and thus, only intermediate appellate published authority exists on the subject. In addition, the reasoning to reach this result is inconsistent with this Court's teachings. In these circumstances, review is in order to re-examine existing intermediate appellate authority in light of the plain language of the statute.

ARGUMENT III

Review Is Required Because The Court Of Appeals Decision In This Case Is Inconsistent With The Plain Language Of The Statute.

In urging this Court decline to review the issue, Speicher argues that the township is attempting to rewrite MCL 15.271(4). (Speicher's Brief in Opposition to Defendant/Appellants Application for Leave to Appeal, pg 17). According to Speicher, "the sole question is whether Speicher succeeded in obtaining relief in the action." (*Id.*). But this articulation of the rule violates a fundamental rule of statutory construction, which is that "[w]hen construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined." *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012). Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012).

The Michigan Legislature enacted a series of provisions dealing with violations, actions to compel compliance, and the relief available. Each of these provisions differs regarding the nature of the action, and the relief available. MCL 15.271 governs civil actions to compel compliance or enjoin noncompliance. The provision sets forth three requirements for obtaining court costs and attorney fees:

- a public body is not complying with the Open Meetings Act

- a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act
- a person succeeds in obtaining relief in the action

The words "injunctive relief" reference common law, which governs the availability of this extraordinary remedy. Although the Legislature may alter the common law, it is well-settled that the principles of the common law will not be abolished by implication. *Marquis v Hartford Accident & Indemnity*, 444 Mich. 638, 652; 513 NW2d 799 (1994) ("well-settled common-law principles are not to be abolished by implication in the guise of statutory construction"). This Court recently addressed the interplay between statutes and the common law, of which the judiciary are stewards, by noting that the Court would "not lightly presume that the Legislature has abrogated the common law" and would not "extend a statute by implication to abrogate established rules of common law." *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012). A bill for injunctive relief may be brought when an injury is threatened. *Wolgamood v Village of Constantine*, 292 Mich 222, 227; 290 NW 388, 389 (1940). Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8-9; 753 NW2d 595, 600 (2008).

The Court of Appeals has correctly reasoned that "[m]erely because a violation of the OMA has occurred does not automatically mean that an injunction must issue restraining the public body from using the violative procedure in the future." *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 533-534; 609 NW2d 574, 579 (2000) citing *Esperance v Chesterfield Twp*, 89 Mich App 456, 44; 280 NW2d 559 (1979) and *Wilkins v Gagliardi*, 219 Mich App 260, 276; 556 NW2d 171 (1996). In other words, where there is no reason to believe that a public body will deliberately fail to comply with the Open Meetings Act in the future, injunctive relief is unwarranted. *Schmiedicke v Clare School Bd*, 228 Mich App 259, 267; 577 NW2d 706 (1998).

Reading these common law principles together with the language in the Open Meetings Act, it is clear that injunctive relief was not in order here, and thus, that actual attorney fees were erroneously imposed on the defendants-appellants. But now, in the Speicher published decision, the Court of Appeals has held to the contrary. These inconsistent approaches create confusion in the law. Thus, review by this Court is required in order to create a uniform approach.

RELIEF

WHEREFORE, Defendants-Appellants Columbia Township Board of Trustees and Columbia Township Planning Commission respectfully request the Court peremptorily reverse the Court of Appeals for the reasons articulated by the Court in its call for a special panel, or failing that, grant this application for leave to appeal and rule that costs and attorney fees are not statutorily authorized here, and enter any and all other relief this Court deems proper in law and equity.

Respectfully submitted,

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